SEP 23 1957
JOHN T. PEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 493

AMERICAN BITUMULS & ASPHALT CO., *et al.*,
Petitioner,

v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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Dated: September 23, 1957.

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v.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of American Bitumuls & Asphalt Co. respectfully shows:

Opinion Below

The opinion of the United States Customs Court (C.D. 1799, R. 15-42), is reported in 37 Cust. Ct. p. 58, C.D. 1799. The opinion of the United States Court of Customs and Patent Appeals (appendix pp. 13-29a) is reported in Treasury Decisions Advance Sheets, Volume 92, No. 32 August 8, 1957, page 42-57, C.A.D. 661, 44 C.C.P.A. (Customs)——.

Jurisdiction

The judgment of the United States Court of Customs and Patent Appeals was rendered June 25, 1957 (appendix p. 29a). The mandate was issued August 2, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. §1256, 62 Stat. 928.

Questions Presented

1. Whether the President, by increasing the rate of duty on crude petroleum from ¼ cent per gallon to ½ cent per gallon by his Proclamation No. 2901 exceeded his authority to modify rates of duty in view of the statutory limitation that

> No proclamation shall be made increasing or decreasing by more than 50 per centum any rate of duty, however established, existing on January 1, 1945.

This question is important in the field of tariff administration and will affect the validity of other presidential actions by proclamation. It is a point of novel impression that has never been reviewed by this court.[1] It should be reviewed because the lower court's decision is demonstrably contrary to the statute.

2. Whether the Court below was correct in holding that Part IV of said proclamation was superfluous and unnecessary, thus overruling the discretionary determination of the President that said Part IV was "required or appropriate" to carry out the provisions of certain named trade agreements, contrary to decisions of this

[1] Except for this case and one other, the legality of a proclamation under the Trade Agreements Act has never been the subject of litigation, although the law has been in effect for 23 years. This resulted principally from the fact that virtually all previous proclamations reduced existing rates and were not subject to challenge that the rate should be higher. *George S. Fletcher* v. *United States*, 25 C.C.P.A. (Customs) 195, T.D. 49294. Substantially the same issues as are here involved were presented in *Metropolitan Petroleum Corp.* v. *United States*, 31 Ct. Cust. Appls. 71, C.D. 1547. The Customs Court held unanimously that the proclamation was *ultra vires* and void. The decision was reversed on appeal (*United States* v. *Metropolitan Petroleum Corp.*, 42 C.C.P.A. (Customs) 38, C.A.D. 567), but the decision rested on the erroneous premise that reduced rates of duty became effective by virtue of the provisions of a trade agreement alone. Hence the validity of the proclamation under the statute was not settled. This court denied certiorari (348 U. S. 858).

court holding that discretionary executive action is not subject to judicial review.

Statement

The statutory tax on imported petroleum has been ½ cent per gallon since 1934. The Trade Agreements Act (appendix p. 1a) permits the President to execute trade agreements with foreign nations undertaking to reduce existing rates within prescribed limits, to make such reductions effective by proclamation and to terminate any such proclamation.

Under the above provisions the President, in 1939, proclaimed a reduction to ¼ cent per gallon on a limited quota of imported petroleum and fixed the rate of over-quota petroleum as not exceeding ½ cent (proclamation under Venezuelan Trade Agreement, appendix p. 5a). In 1942, by proclamation under the Mexican Trade Agreement, the rate of ¼ cent per gallon was extended to all imports of petroleum (appendix p. 6a).

In 1945 the Trade Agreements Act was amended to read:

> No proclamation shall be made increasing or decreasing by more than 50 per centum any rate of duty, however established, existing on January 1, 1945. * * *.

In 1948 the proclamation of the General Agreement on Tariffs and Trade (appendix p. 7a) bound the rate of import tax on topped crude petroleum and certain other forms of petroleum to the rate applicable to crude petroleum.

By Proclamation No. 2901 (appendix p. 7a) effective January 1, 1951, the President stated that the Trade Agreement with Mexico was ended, and that in order to put into effect provisions of the Venezuelan Agreement and the General Agreement on Tariffs and Trade

related to petroleum, he was terminating his proclamation under the Mexican agreement and proclaiming a rate of duty for petroleum of ½ cent per gallon.

The several shipments of petroleum in this case imported during 1951 and 1952, were taxed accordingly.

The importer protested the assessment of the rate of ½ cent per gallon under appropriate law (46 Stat. 734, 19 U.S.C. §1514) claiming that the proper tax was at ¼ cent per gallon. The case was referred to the United States Customs Court. That tribunal held (R. 15-41) that the proclamation was divisible in two parts. Insofar as it proclaimed the termination of the Mexican proclamation and thus ended the effectiveness of the rate of ¼ cent per gallon, it was valid. Insofar as it proclaimed the rate of ½ cent, it violated the statutory limitation quoted above and was void. The Customs Court held that on the termination by proclamation of the rate of ¼ cent, the new rate thereafter effective became so by operation of the law. It held that since such rate necessarily resulted from the effect of Proclamation No. 2901, it would be affected by the limitations in the Trade Agreement Act. The rate resulting from a proclamation could not increase by more than 50 per cent the rate in effect on January 1, 1945. Thus it held that the statutory rate was restored to the extent permitted by the Trade Agreements Act. This was an increase of 50 per cent of the 1945 rate of ¼ cent per gallon, or ⅜ cent per gallon.

Both sides appealed, the importer claiming that the proclamation was illegal and void for all purposes, the government insisting that it was valid to sustain the assessment.

The Court of Customs and Patent Appeals held that the proclamation terminated the rate of ¼ cent and restored the rate of ½ cent, that the power of the President to increase rates of duty by proclamation terminating a lower rate was unaffected by the statutory limitations and that

accordingly the tax was lawfully increased 100 per cent by the proclamation, even though Part IV of the proclamation was void. (It was in Part IV that the President had proclaimed that the rate of ½ cent per gallon was "required or appropriate" to carry out the Venezuelan Agreement and the General Agreement, and was therefore effective).

Thus the court held, in effect, that the proclamation could terminate the rate of ¼ cent and restore the rate of ½ cent, but that it was illegal for the President to affirmatively state this, as he had done in Part IV of the proclamation.

Statutes and Presidential Proclamations

The provisions of the Statutes and the Presidential Proclamations involved in this case are as follows, their pertinent text being set forth in the appendix:

	Appendix A page
Internal Revenue Code, 53 Stat. 414, 26 U.S.C. Section 3422	1a
Trade Agreement Act of 1934, 48 Stat. 943, 19 U.S.C., 1940 Edition, Section 1351 *et seq.*	1a
Trade Agreement Act of 1945, 59 Stat. 410, 18 U.S.C. Section 1351 *et seq.*	3a
Presidential Proclamation following Trade Agreement with Venezuela, 54 Stat. 2404, 75 Treas. Dec. 165, T.D. 50015	5a
Presidential Proclamation following Trade Agreement with Mexico, 57 Stat. 833, 78 Treas. Dec. 190, T.D. 50797	6a
Presidential Proclamation following General Agreement on Tariffs and Trade, 61 Stat. 1103; 82 Treas. Dec. 305, T.D. 51802	7a
Presidential Proclamation No. 2901, following termination of Mexican Trade Agreement, 64 Stat. A 427, 85 Treas. Dec. 252	7a

Reasons for Granting the Writ

The case at bar holds that Presidential Proclamation No. 2901 may increase by 100 per cent the rate of duty existing on January 1, 1945 while the law limits such increase to 50 per cent of said rate. Thus it authorizes the President to exceed the limitation of the law when he is performing a limited part of a legislative function and when the validity of his action depends upon strict compliance with the statute from which he derives his authority. This is directly contrary to decisions of this court holding that whenever the President acts as an agent of the legislature his limited function is to carry out the legislative program *within the limits prescribed by the statute.*[2]

To justify this result, the Court below has in effect reformed and rewritten the proclamation substituting its construction for the purposes clearly expressed by the President. The President stated in Part IV of the proclamation that the rate of ½ cent per gallon was required or appropriate to carry out the provisions of the Trade Agreement with Venezuela and the General Agreement on Tariffs and Trade, but the Court held that the publication of this part of the proclamation was not required or appropriate but was in fact ineffective and unnecessary. The President proclaimed in part 1(b) that he was terminating his earlier proclamation under the Trade Agreement with Mexico, but the Court construed this part of the proclamation as putting into effect the rate of ½ cent per gallon. Thus the court changed the purpose expressed by the President for two vital parts of the proclamation, contrary to the rule frequently expressed

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[2] *Field* v. *Clark*, 143 U. S. 649, *J. W. Hampton Jr. & Co.* v. *United States*, 276 U. S. 394.

by this court that discretionary executive action taken by the President under a statute is not subject to judicial review.[3]

I

In Proclamation No. 2901, the President announced the termination of his proclamation of the Mexican Trade Agreement of 1942. Said proclamation was the authority under which the rate of duty on petroleum had been reduced to 1/4 cent per gallon. The President made clear the reason for terminating the rate of 1/4 cent per gallon through Part 1(b) of the proclamation when he stated in Part IV, his clear intention to put into effect the rate of duty on petroleum provided by the Venezuelan Trade Agreement and the General Agreement on Tariffs and Trade. Thus there can be doubt from the language of Proclamation No. 2901, that, insofar as it related to petroleum, its primary purpose was to put into effect the rate of duty of 1/2 cent per gallon and that the termination of the proclamation under the Mexican Trade Agreement was an incidental accomplishment necessary to the establishment of the higher rate.

It is not questioned that the President has authority to proclaim modifications of duty rates within the limits set by the Trade Agreements Act. Since this power resides fundamentally in Congress and was delegated to the President by statute, the validity of any change in tariff rates made by the President depends upon his compliance with the law under which the right to make such change is authorized.[4] In Proclamation No. 2901 the President stated (Recital 16, appendix p. 11a) that in

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[3] *United States* v. *George S. Bush & Co., Inc.*, 310 U. S. 379, 60 S. Ct. 944.

[4] *Field* v. *Clark, supra.*

his judgment it was required or appropriate to carry out the provisions of the Trade Agreement with Venezuela and the General Agreement on Tariffs and Trade, that imports of petroleum should be subject to tax at the rate of ½ cent per gallon. To carry out this purpose, he terminated (in Part I(b)) the lower rate which had been effective by his proclamation under the Mexican Trade Agreement and (in Part IV) he established again the rate of ½ cent per gallon. There can not be the slightest doubt that by this action the President was attempting to increase by 100 per cent the rate of duty which existed for petroleum on January 1, 1945. This proclamation was void by virtue of the provision in the Trade Agreements Act which forbids any proclamation increasing the duty rates of January 1, 1945 by more than 50 per cent. It was the duty of the lower court to have so held.

II

To avoid a declaration that the proclamation before it was invalid the lower court held that the document was both effective and ineffective for the same purpose. As noted above, it held that Part IV, which actually proclaimed the rate of duty of ½ cent per gallon, was "ineffective to establish any rate whatever." Then it held that the intention of Part I(b) of the proclamation, standing alone, with respect to petroleum "was to restore the situation which had existed prior to the proclamation carrying out the Mexican Trade Agreement and while the Venezuelan Proclamation was in full effect." Part I(b) does not so state and does not purport to do anything but terminate the President's proclamation of 1942. Thus the lower court, in order to sustain the rate of duty imposed on authority of Proclamation No. 2901, first

held that Part IV of the proclamation was ineffective because it violated the statute but then ruled that Part I(b) had the effect which the President was seeking to accomplish and had expressed in Part IV.

The premise upon which the lower court reached its conclusion was its judgment that it could apply to this proclamation the rule permitting the severance of an invalid portion of a statute to give effect to the remainder. The Court cited *Allen* v. *Louisiana*, 103 U. S. 80. But neither that case nor any other holds that the rule permitting severance of an invalid provision of a statute may be applied to give to the remaining provisions, *the effect of that portion which has been adjudged to be invalid.* The proclamation cannot be construed to be effective and ineffective for the same purpose. This is exactly what the court below has done.

III

Where the statute empowers the President with discretion to take certain action upon the happening of certain facts, it is well settled that the President's determination as to the necessity of the action which he took is not subject to judicial review. *Bush* v. *United States, supra.* In Part IV of the proclamation, the President took the action which, he stated, was considered to be required or appropriate. The Court below correctly held that the action taken was beyond the limits of the statute. But the extent of the court's authority was to pass upon the *legality* of the action. It could not review questions of wisdom or necessity. It did so when it held that "while the wording of Proclamation No. 2901 leaves much to be desired, the intended purpose of the proclamation" was valid. *But the purpose that it found to be valid was pre-*

cisely expressed in the wording that it held to be void. It accomplished this by substituting its judgment for that of the President that the proclamation of the rate of ½ cent was necessary. In the *Bush* case it was urged that the President, in carrying out a similar, delegated legislative function related to tariff rates, had illegally calculated and fixed a rate of exchange and that therefore his proclamation was void. This court held that the subject was not within the scope of judicial review. It said (p. 379):

> • • • Whatever may be the scope of appellate jurisdiction conferred by Section 501 of the Tariff Act of 1930, it certainly does not permit judicial examination of the judgment of the President that the rates of duty recommended by the commission are necessary to equalize the differences in the domestic and foreign cost of production.

Here too, the court below reversed the action of the President that the proclamation of a rate of duty was required or appropriate to carry out certain trade agreements. Then it held that the rates were validly established by changing the purpose established in Part I(b) of the proclamation. Aside from the fact that the proclamation cannot be both valid and void in fixing the rate of ½ cent per gallon, the lower court was without authority to change the purposes expressed for the proclamation. Its limited function was to determine the validity of the document, *as written*. As written, the proclamation was void in the purpose expressed through its language, and the court below should have held accordingly.

CONCLUSION

For the reasons set forth above, it is submitted that the petition for a writ of certiorari to the Court of Customs and Patent Appeals should be granted.

Respectfully submitted,

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JOSEPH F. DONOHUE,
Of Counsel.

APPENDIX A

STATUTES AND PRESIDENTIAL PROCLAMATIONS

Internal Revenue Code

§3420. Imposition of tax.

In addition to any other tax or duty imposed by law, there shall be imposed upon the following articles imported into the United States unless treaty provisions of the United States otherwise provide a tax at the rate specified in Sections 3422 to 3425, inclusive. 53 Stat. 414.

§3422. Petroleum and derivatives.

Crude petroleum, ½ cent per gallon; fuel oil derived from petroleum, gas oil derived from petroleum and all liquid derivatives of crude petroleum, except lubricating oil and gasoline or other motor fuel, ½ cent per gallon; gasoline or other motor fuel, 2½ cents per gallon; lubricating oil, 4 cents per gallon; paraffin and other petroleum wax products, 1 cent per pound. The tax on the articles described in this section shall apply only with respect to the importation of such articles. 53 Stat. 414.

Trade Agreements Act of 1934

§1351. Foreign trade agreements—Authority of President; modification of duties; altering import restrictions.

(a) For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in the present emergency in restoring the American standard of living, in overcoming domestic unemployment and the present economic depression, in increasing the purchasing power of the American public and in establishing and maintaining a better relationship among various

branches of American agriculture, industry, mining, and commerce) by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time—

(1) To enter into foreign trade agreements with foreign governments or instrumentalities thereof; and

(2) To proclaim such modification of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder. No proclamation shall be made increasing or decreasing by more than 50 per centum any existing rate of duty or transferring any article between the dutiable and free lists. The proclaimed duties and other import restrictions shall apply to articles the growth, produce, or manufacture of all foreign countries, whether imported directly, or indirectly: *Provided*, That the President may suspend the application to articles the growth, produce, or manufacture of any country because of its discriminatory treatment of

American commerce or because of other acts or policies which in his opinion tend to defeat the purposes set forth in this section; and the proclaimed duties and other import restrictions shall be in effect from and after such time as is specified in the proclamation. The President may at any time terminate any such proclamation in whole or in part. 48 Stat. 943.

TRADE AGREEMENTS ACT OF 1945

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the period during which the President is authorized to enter into foreign trade agreements under section 350 of the Tariff Act of 1930, as amended and extended, is hereby extended for a further period of three years from June 12, 1945.

Section 2. (a) The second sentence of subsection (a)(2) of such section, as amended (U.S.C., 1940 edition, Supp. IV, title 19, sec. 1351(a)(2)), is amended to read as follows: "No proclamation shall be made increasing or decreasing by more than 50 per centum any rate of duty, however established, existing on January 1, 1945 (even though temporarily suspended by Act of Congress), or transferring any article between the dutiable and free lists. * * * 59 Stat. 410.

TRADE AGREEMENTS ACT OF 1955

* * * * *

(a) (1) * * *

(A) To enter into foreign trade agreements with foreign governments or instrumentalities thereof:

Provided, That the enactment of the Trade Agreements Extension Act of 1955 shall not be construed to determine or indicate the approval or disapproval by the Congress of the executive agreement known as the General Agreement on Tariffs and Trade.

(B) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.

(2) No proclamation pursuant to paragraph (1)(B) of this subsection shall be made—

(A) Increasing by more than 50 per centum any rate of duty existing on January 1, 1945.

(B) Transferring any article between the dutiable and free lists.

(C) In order to carry out a foreign trade agreement entered into by the President before June 12, 1955, or with respect to which notice of intention to negotiate was published in the Federal Register on November 16, 1954, decreasing by more than 50 per centum any rate of duty existing on January 1, 1945.

* * * * *

(5) The President may at any time terminate, in whole or in part, any proclamation made pursuant to this section.

Internal Revenue Code Section	Description of article	Rate of import tax
3422	Crude petroleum, topped crude petroleum, and fuel oil derived from petroleum including fuel oil known gas oil	¼¢ per gal.
	Provided, That such petroleum and fuel oil entered, or withdrawn from warehouse, for consumption in any calendar year in excess of 5 per centum of the total quantity of crude petroleum processed in refineries in continental United States during the preceding calendar year, as ascertained by the Secretary of the Interior of the United States, shall not be entitled to a reduction in tax by virtue of this item, but the rate of import tax thereon shall not exceed	½¢ per gal.
	Provided further, That if this item becomes effective after the beginning of a calendar year the quantity of such petroleum and fuel oil which may be entered or withdrawn from warehouse for consumption at the reduced rate during the remainder of such calendar year shall be one-twelfth of the foregoing quantity multiplied by the number of months (treating any part of a month as a full month) during which this item shall be in effect during such calendar year.	

Article XIX of said Venezuelan Trade Agreement, incorporated in the above proclamation read as follows:

ARTICLE XIX

The present Agreement shall be proclaimed by the President of the United States of America and shall be ratified by the Government of the United States of Venezuela in conformity with the laws of the respective countries. It shall enter into full force thirty days after the exchange of the proclamation and the instrument of ratification, which shall take place in the City of Washington as soon as possible, and shall continue in force until December 15, 1942, unless terminated in accordance with the provisions of Articles VI, IX, or XII.

Unless at least six months before December 15, 1942, the Government of either country shall have given to the other Government written notice of intention to terminate this Agreement on that date, the Agreement shall remain in force thereafter, subject to the provisions of Articles VI, IX, and XII, until six months from such time as the Government of either country shall have given notice to the other Government.

Mexican Trade Agreement Proclamation

Internal Revenue Code Section	Description of article	Rate of import tax
3422	Crude petroleum, topped crude petroleum, and fuel oil derived from petroleum including fuel oil known as gas oil	¼¢ per gal.
3422	Kerosene	¼¢ per gal.
3422	Liquid petroleum asphaltum, including cut-backs and road oil	¼¢ per gal.

PROCLAMATION FOLLOWING GENERAL AGREEMENT ON TARIFFS AND TRADE

Internal Revenue Code Section	Description of article	Rate of import tax
* * *	* * *	
3422	Topped crude petroleum, fuel oil derived from petroleum including fuel oil known as gas oil, and all liquid derivatives of crude petroleum (except lubricating oil and such derivatives specified hereinafter in any item 3422)	1/4¢ per gal.
	Provided, That in no event shall the rate of import tax applicable under section 3422, Internal Revenue Code, or any modification thereof, to topped crude petroleum or fuel oil derived from petroleum be less than the rate of such tax applicable to crude petroleum.	

PRESIDENTIAL PROCLAMATION No. 2901, T.D. 52559

By the President of the United States of America

A Proclamation

* * *

5. Whereas, pursuant to the authority vested in the President by the Constitution and the statutes, including section 350(a) of the Tariff Act of 1930, as amended by the said act of June 12, 1934, the period for the exercise of the authority under the said section 350 having been extended by the joint resolution approved April 12, 1940 until the expiration of three years from June 12, 1940

(ch. 96, 54 Stat. 107), the President of the United States of America entered into a trade agreement with the President of the United Mexican States on December 23, 1942 (57 Stat. 835) and proclaimed such trade agreement by proclamations dated December 28, 1942 (57 Stat. 833) and December 31, 1942 (57 Stat. 909);

6. Whereas the Government of the United States has agreed with the Government of the United Mexican States that the said trade agreement shall cease to be effective after December 31, 1950;

7. Whereas the final sentence of said section 350(a) authorizes the President of the United States to terminate in whole or in part any trade agreement proclamation made under said section 350(a);

• • •

11. Whereas I determine that, following the termination of the said trade agreement specified in the fifth recital of this proclamation, the rates of duty for the following descriptions of products in the ninth recital of the said proclamation of January 1, 1948, as amended and rectified, which are required or appropriate to carry out on and after January 1, 1951, the provisions of subparagraph (c) of numbered paragraph 2 of the said exclusive trade agreement specified in the ninth recital of this proclamation, are the rates specified below in the column at the right of the respective descriptions of products:

• • •

12. Whereas, pursuant to the authority vested in the President by the Constitution and the Statutes, including section 350(a) of the Tariff Act of 1930, as amended by the said act of June 12, 1934, the period for the exercise of the authority under the said section 350 having been

extended by the joint resolution approved March 1, 1937, until the expiration of three years from June 12, 1937 (ch. 22, 50 Stat. 24), the President of the United States of America entered into a definitive trade agreement on November 6, 1939, with the President of the Republic of Venezuela (54 Stat. 2377), which definitive agreement was proclaimed by the President on November 16, 1939, and entered into full force on December 14, 1940, as proclaimed by the President on November 27, 1940 (54 Stat. 2402);

13. Whereas, the item listed under Internal Revenue Code Section 3422 of Schedule II of the said definitive agreement with Venezuela referred to in the twelfth recital of this proclamation provides as follows:

Internal Revenue Code Section	Description of article	Rate of import tax
3422	Crude petroleum, topped crude petroleum, and fuel oil derived from petroleum including fuel oil known as gas oil	¼¢ per gal.
	Provided, That such petroleum and fuel oil entered, or withdrawn from warehouse, for consumption in any calendar year in excess of 5 per centum of the total quantity of crude petroleum processed in refineries in continental United States during the preceding calendar year, as ascertained by the Secretary of the Interior of the United States, shall not be entitled to a reduction in tax by virtue of this item, but the rate of import tax thereon shall not exceed	½¢ per gal.

Provided further, That if this item becomes effective after the beginning of a calendar year the quantity of such petroleum and fuel oil which may be entered or withdrawn from warehouse for consumption at the reduced rate during the remainder of such calendar year shall be one-twelfth of the foregoing quantity multiplied by the number of months (treating any part of a month as a full month) during which this item shall be in effect during such calendar year.

14. Whereas the first item listed under Internal Revenue Code Section 3422 found in Part I of Schedule XX of the said General Agreement specified in the first recital of this proclamation provides as follows:

Internal Revenue Code Section	Description of article	Rate of import tax
3422	Topped crude petroleum, fuel oil derived from petroleum including fuel oil known as gas oil and all liquid derivatives of crude petroleum (except lubricating oil and such derivatives specified hereinafter in any item 3422)	1¼¢ per gal.
	Provided, That in no event shall the rate of import tax applicable under section 3422, Internal Revenue Code, or any modification thereof, to topped crude petroleum or fuel oil derived from petroleum be less than the rate of such tax applicable to crude petroleum.	

15. Whereas upon the termination of the said proclamation of December 31, 1942, the said item 3422 set forth in the thirteenth recital of this proclamation and the said first item 3422 set forth in the fourteenth recital hereof will become fully effective;

16. Whereas I determine that it is required or appropriate to carry out the said trade agreements specified in the first and twelfth recitals of this proclamation on and after January 1, 1951, that crude petroleum, topped crude petroleum, and fuel oil derived from petroleum, including fuel oil known as gas oil, entered, or withdrawn from warehouse, for consumption in any calendar year in excess of an aggregate quantity of all such products equal to 5 per centum of the total quantity of crude petroleum processed in refineries in continental United States during the preceding calendar year, as provided in said item 3422 set forth in the thirteenth recital of this proclamation shall be subject to import tax at the rate of ½ cent per gallon;

Now Therefore, I, Harry S. Truman, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution and the statutes, including the said section 350 of the Tariff Act of 1930, as amended, do proclaim as follows:

Part I

* * *

(b) The said proclamations of December 28, and 31, 1942, relating to the said trade agreement with the United Mexican States, shall be terminated in whole as of the close of December 31, 1950.

* * *

PART IV

To the end that the said trade agreements specified in the first and twelfth recitals of this proclamation may be carried out, crude petroleum, topped crude petroleum, and fuel oil derived from petroleum, including fuel oil known as gas oil, entered, or withdrawn from warehouse, for consumption in any calendar year beginning with the calendar year 1951, in excess of an aggregate quantity of all such products equal to 5 per centum of the total quantity of crude petroleum processed in refineries in continental United States during the preceding calendar year, specified in the said item 3422 set forth in the thirteenth recital of this proclamation, shall be subject to import tax at the rate of ½ cent per gallon.

• • •

APPENDIX B

OPINION OF THE COURT OF CUSTOMS AND PATENT APPEALS

United States Court of Customs and Patent Appeals

THE UNITED STATES, *Appellant,* *v.* AMERICAN BITUMULS & ASPHALT Co., *et al.*, *Appellees.*	October Term 1956. Cutoms Appeal No. 4899. Customs Calendar No. 37.
AMERICAN BITUMULS & ASPHALT Co., *et al.*, *Appellants,* *v.* THE UNITED STATES, *Appellee.*	October Term 1956. Customs Appeal No. 4900. Customs Calendar No. 38.

RICH, Judge.

These are cross appeals from the decision of the United States Customs Court, First Division (C.D. 1799), sustaining in part, a protest by the imp ter and holding that the tax or duty assessed against the merchandise, which was crude petroleum and fuel oil, should be at the rate of 3/8 cent per gallon, rather than 1/2 cent, as assessed by the collector. It is contended by the Govern-

ment that the rate found by the collector is correct, while the importer contends that the rate should be ¼ cent per gallon or, alternatively, that it should be ⅜ cent per gallon as found by the Customs Court.

The ultimate issue to be decided here is identical with that presented to this court in 1954 and decided in *United States* v. *Metropolitan Petroleum Corp., et al.*, 42 C.C.P.A. (Customs) 38 C.A.D. 567, in which we reversed the decision of the Customs Court, which there applied a rate of ¼ cent per gallon, and held the proper rate to be ½ cent per gallon. Consequently there has been much flailing of old straw because the court below saw fit not to follow our decision in the *Metropolitan* case, bending to the vociferous arguments of the importers that it should not be *stare decisis* because of "certain inconsistencies and anomalies in and flowing from the said decision," as stated in the lower court's opinion. Notwithstanding the importers' new approaches to the issues and the novel result reached in the elaborate opinion of the lower court, we are still of the view that the tax of ½ cent per gallon, held to be the proper rate in the *Metropolitan* case, is the only proper rate and we shall try to state our reasons in sufficiently clear English to avoid further misunderstanding.

The pertinent facts are as follows:

By a series of revenue acts ultimately codified as sections 3420-3422 of the Internal Revenue Code (approved February 10, 1939), Congress imposed a tax of ½ cent per gallon on imported crude petroleum.

The Reciprocal Trade Agreements Act of 1934 (48 Stat. 943, 19 U.S.C. sections 1351-1354) added to the Tariff Act of 1930 a new Section 350 which included the following provisions:

(a) For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in the present emergency in restoring the American standard of living, in overcoming domestic unemployment and the present economic depression, in increasing the purchasing power of the American public and in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining, and commerce) by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time—

(1) To enter into *foreign trade agreements* with foreign governments or instrumentalities thereof; and

(2) *To proclaim* such modification of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate *to carry out any foreign trade agreement* that the President has entered into hereunder. *No proclamation shall be made increasing or decreasing by more than 50 per centum any existing rate of duty*

or transferring any article between the dutiable and free lists. The proclaimed duties and other import restrictions shall apply to articles the growth, produce, or manufacture of all foreign countries, whether imported directly, or indirectly: *Provided,* That the President may suspend the application to articles the growth, produce, or manufacture of any country because of its discriminatory treatment of American commerce or because of other acts or policies which in his opinion tend to defeat the purposes set forth in this section; and the proclaimed duties and other import restrictions shall be in effect from and after such time as is specified in the proclamation. *The President may at any time terminate any such proclamation in whole or in part.* 48 Stat. 943. (Emphasis ours.)

By a trade agreement with Venezuela *made effective on December 16, 1939 by Presidential proclamation dated November 16, 1939* (54 Stat. 2402) the statutory tax of ½ cent per gallon on crude petroleum was reduced to ¼ cent on imports not exceeding a quota of 5 per cent of the total quantity of crude petroleum processed in the refineries of the continental United States during the preceding calendar years. As to crude petroleum in excess of that quota, the agreement did not affect the tax, which thus remained at ½ cent per gallon, the rate established by the Internal Revenue Code.

Thereafter, by a trade agreement with Mexico rendered effective on January 30, 1943 by Presidential proclamations dated December 28 and 31, 1942 (57 Stat. 833, 909) the tax was reduced to ¼ cent per gallon on *all* crude petroleum imported.

The act of July 5, 1945 (59 Stat. 410) amended part (a)(2) of paragraph 350 of the 1930 Tariff Act, quoted

above, by substituting for the second sentence thereof (which we have italicized) the following:

> No proclamation shall be made increasing or decreasing by more than 50 per centum any rate of duty, *however established, existing on January 1, 1945* (even though temporarily suspended by Act of Congress), or transferring any article between the dutiable and free lists. (Emphasis ours.)

The parties agree that the "established rate of duty" on crude petroleum on January 1, 1945, within the meaning of the proviso last quoted, was the tax of ¼ cent per gallon and that the ¼ cent rate was established by the proclamation of the Mexican agreement.

On September 6, 1950, the President issued Proclamation No. 2901, the center of the present dispute, effective January 1, 1951 (64 Stat. A 427, T.D. 52559) which contained numerous "whereas" clauses including the following:

> 6. Whereas the Government of the United States has agreed with the Government of the United Mexican States that the said trade agreement shall cease to be effective after December 31, 1950;
>
> 7. Whereas the final sentence of said section 350(a) authorizes the President of the United States to terminate in whole or in part any trade agreement proclamation made under said section 350(a);
>
> 16. Whereas I determine that it is required or appropriate to carry out the said trade agreements specified in the first [General Agreement on Tariffs and Trade] and twelfth [Trade Agreement with Venezuela] recitals of this proclamation on and

after January 1, 1951, that crude petroleum, topped crude petroleum, and fuel oil derived from petroleum, including fuel oil known as gas oil, entered, or withdrawn from warehouse, for consumption in any calendar year in excess of an aggregate quantity of all such products equal to 5 per centum of the total quantity of crude petroleum processed in refineries in continental United States during the preceding calendar year, as provided in said item 3422 set forth in the thirteenth recital of this proclamation shall be subject to import tax at the rate of ½ cent per gallon; (Matter in backets added).

The proclamations actually made included the following:

Part I

• • •

(b) The said proclamations of December 28, and 31, 1942, relating to the said trade agreement with the United Mexican States, shall be terminated in whole as of the close of December 31, 1950.

• • •

PART IV

To the end that the said trade agreements specified in the first and twelfth recitals of this proclamation may be carried out, crude petroleum, topped crude petroleum, and fuel oil derived from petroleum, including fuel oil known as gas oil, entered, or withdrawn from warehouse, for consumption in any calendar year beginning with the calendar year 1951, in excess of an aggregate quantity of all such products equal to 5 per centum of the total quantity of crude petroleum processed in refineries in continental United States during the preceding calendar year, specified in the said item 3422 set forth in the thirteenth recital of this proclamation, shall

be subject to import tax at the rate of ½ cent per gallon.

* * *

It has been stipulated that the tax or duty of ½ cent per gallon in the instant case was assessed by the collector under the authority of Presidential proclamation 2901, *supra*, and it is evident that such assessment is in accord with Part IV of that proclamation. It is contended by the importer, however, that the proclamation is invalid for the reason that it *purports* to increase by one hundred percent (from ¼ to ½ cent per gallon) the rate of duty existing on January 1, 1945. Such an increase, it is asserted, would violate paragraph (a)(2) of Section 350 of the 1930 Tariff Act as amended July 5, 1945, *supra*, which provides that "No proclamation" shall increase such a rate of duty by more than fifty per cent.

It is contended by the Government, on the other hand, that the words "No proclamation," when taken in context, are limited to such proclamations as give effect to a trade agreement, and do not apply to proclamations, such as the one here involved, which terminate other proclamations.

The first argument advanced in support of the Government's contention relates to the position of the words "No proclamation" in paragraph (a)(2) as amended. They appear in the second sentence of the paragraph, immediately following the statement that the President may proclaim such modifications as are required or appropriate to carry out trade agreements, and they are separated, by the generalization clause, from the sentence authorizing the President to terminate the proclamations previously referred to. The logical inference, the Government contends is that the expression "No proclama-

tion" means no proclamation of the kind referred to in the preceding sentence.

Moreover, says the Government, the termination clause of paragraph 350 does not specify that the termination of a proclamation is to be effected by another proclamation. Accordingly, although a terminating proclamation may, in fact, be necessary, paragraph (a)(2) seems clearly to make a distinction between a carrying-out proclamation and the termination of a proclamation, and to apply the 50 per centum limit only to the former.

It is to be noted that in paragraph (a)(2) as originally drawn the prohibition against rate changes of more than 50 per cent of "any existing rate of duty" was based on rates in existence at the time of its enactment. It was therefore impossible for the termination of *any* proclamation to effect a change of more than 50%, since the termination could do no more than restore a rate which had been legally established either by statute or by a previous proclamation and which served as the base of the 50% prohibition. At that time, therefore, there was no reason for associating the "No proclamation" provision with the *termination* of proclamations. It was only when the amendment of 1945 was made, establishing *new base rates*, that it became possible for a terminating proclamation to effect a change of more than 50 per cent of the *new base rate*.[1] If it had been the intention of Congress at that time to impose a new limitation on the terminating power, it seems reasonable to suppose that it

[1] This case involves the mathematical phenomenon that a reduction from ½ cent to ¼ cent is a 50% reduction while a restoration from ¼ cent to ½ cent is a 100% increase. This causes no difficulty under the language of the second sentence of paragraph (a)(2) so long as the "rate of duty" serving as the base, against which the percent of change is measured, is fixed. But when a duty resulting from a 50% decrease is established as a new base, *after* the

would have done so by an express reference to that power.

The final sentence of paragraph (a)(2) of Section 350, literally construed, gives the President unqualified power to terminate *any* proclamation which he has made under that paragraph; and since it appears to be agreed by the parties that such termination cannot affect rates of duty unless it is proclaimed, it is evident that the paragraph *must* be construed as empowering the President to *proclaim* the termination of *any* proclamation, even if such termination has the effect of raising a rate 100%. It thus seems evident that the second and fourth sentences of the paragraph cannot both be literally construed. Either the second sentence must be read as excluding proclamations which terminate other proclamations, or the fourth sentence must be read as excluding terminating proclamations which would have the effect of increasing or decreasing duties by more than 50 per cent of the 1945 rate. Under such circumstances, there must be departure from a literal interpretation in some respect and it is proper for this court to consider the probable intent of Congress in determining what is the proper interpretation.

It does not seem logical to suppose that Congress would empower the President to enter into and proclaim agreements granting lower rates of duty to foreign countries, presumably in exchange for concessions granted to the United States, and at the same time prohibit him from restoring the original rates if the agreement were terminated and the concessions to the United States withdrawn, resulting in a continuing low rate of

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making of the reduction, as was done by the 1945 amendment, mere restoration of the original rate is bound to be an increase of 100%. This simple arithmetical fact underlies all of the litigation in this and the *Metropolitan* cases.

duty on the foreign goods, with nothing received in exchange. Such an interpretation should not be placed on the statute if its language will support a more reasonable one.

There is a logical reason for placing a limitation on the tariff changes which may be effected by proclamations giving effect or carrying-out trade agreements but not on those which merely *terminate* other proclamations, since the latter can do no more than restore rates which have already been legally established, and are thus inherently limited.

The Government brief points out that there have been cases in which paragraph (a)(2) of Section 350 as amended in 1945 has been administratively interpreted to permit a change in duty by more than 50 per cent of the 1945 rate by means of a terminating proclamation and that since those cases arose Congress has repeatedly amended the Reciprocal Trade Agreement Act without indicating disapproval of such interpretations.

The same brief points out that the Trade Agreement Extension Act of 1955, a revision of the original 1934 statute, contains a provision which limits the prohibition against rate changes of more than 50 per cent of the January 1, 1945 rate to proclamations which *carry out* a foreign trade agreement, and that the Congressional committee reports with respect to that provision stated that it "*continues unchanged* the present prohibition against increasing any rate of duty to more than 50 percent above the rate existing on January 1, 1945." (Emphasis ours). There is thus a clear indication that those who drafted the committee reports were of the opinion that the "No proclamation" limitation in the 1945 amendment of paragraph (a)(2) applied only to proclamations giving effect to trade agreements.

In view of the circumstances above set forth, we conclude that the prohibition contained in the second sentence of paragraph (a)(2) of Section 350 of the Tariff Act of 1930, as amended by the Act of July 5, 1945, is not applicable to proclamations which *terminate* other proclamations.

Part I(b) of Proclamation No. 2901 purports to terminate the proclamations which related to the Mexican trade agreement and established the rate of duty of ¼ cent per gallon for all crude petroleum imports. Considering that part to be valid and effective for its stated purpose, its effect would be to remove that agreement from the picture and to reestablish the rate of duty existing prior to the proclamation of the Mexican agreement. That rate was the ½ cent per gallon as provided for by section 3422 of the Internal Revenue Code, except that, as to crude petroleum falling *within* the 5% quota specified in the proclamation of the Venezuelan agreement, the rate was ¼ cent per gallon. The petroleum here involved was outside that quota. While the act of July 5, 1945 established the rates of duty existing on January 1, 1945 as a new base rate for the prohibition contained in the second sentence of paragraph (a)(2), it did not otherwise change the status of those rates in any respect pertinent here. Specifically, it did not alter the status of the tax on over-quota crude petroleum imports which had been fixed at ½ cent per gallon by the Internal Revenue Code and reduced to ¼ cent per gallon by the Mexican agreement, during the life of that agreement. It follows that Part I(b) of Proclamation No. 2901, if not invalidated by other parts of the proclamation, had the effect of restoring the rate of ½ cent per gallon as to over-quota imports.

It is evident from the portions of Proclamation No. 2901 above quoted and possibly others,[2] that its drafters were of the opinion that the termination of the proclamation of the Mexican agreement would restore in full the rates specified in Section 3422 of the Internal Revenue Code and that in order to reestablish the quota and reduced rate included in the Venezuelan agreement it was necessary to again proclaim them. As above noted, the Venezuelan agreement has no direct application to the instant case, which concerns only over-quota petroleum, but we are of the opinion that the termination of the proclamation of the Mexican agreement served to restore to full operativeness the original proclamation of the Venezuelan agreement in the same manner as it restored section 3422 of the Internal Revenue Code.

It is contended by the importer that Part IV of Proclamation No. 2901, which purports to proclaim anew the provisions of the Venezuelan proclamation, is in violation of paragraph (a)(2) of Section 350 as amended in 1945, *ultra vires*, and void since it seeks to increase a rate of duty by more than 50% of the January 1, 1945 rate. The Government urges that Part IV is merely redundant in seeking "to accomplish what already was the law" since the rates which it purports to establish are made effective by Part I(b). It is unnecessary for us to decide which of those positions is correct, since it is clear to us that, whether because of invalidity or superfluity, Part IV is ineffective to establish any rate whatever.

It remains to be considered whether the fact that Part IV of Proclamation No. 2901 is a nullity serves to render

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[2] Recital 15 reads as follows: "Whereas upon the termination of the said proclamation of December 31, 1942, the said item 3422 set forth in the thirteenth recital of this proclamation and the said first item 3422 set forth in the fourteenth recital hereof will become fully effective."

Part I(b) void. Even if we accept the importers' argument that Part IV is illegal, *ultra vires* and hence void, the test of validity of the remainder to be applied in such a case would appear to be the same as that applied in cases of partial invalidity of statutes due to unconstitutionality, namely, as stated in *Allen* v. *Louisiana,* 103 U. S. 80, 84, "whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature."

We are of the opinion, as was the Customs Court, that Parts I(b) and IV of Proclamation No. 2901 are severable. It is evident that the intention of the proclamation, so far as the involved petroleum products are concerned, was to restore the situation which had existed prior to the proclamations carrying out the Mexican trade agreement and while the Venezuelan proclamation was in full effect. In our opinion, that is exactly what was done by Part I(b) standing alone. The elimination of Part IV, therefore, clearly would not serve to render the apparent intent of Proclamation 2901 ineffective in any respect.

It seems to be contended by the importer, and to have been held by the Customs Court, that the courts cannot review the President's recited determination that Part IV of Proclamation No. 2901 was "required or appropriate to carry out" the Venezuelan trade agreement, and must therefore conclude that the said proclamation remains ineffective unless Part IV can restore it. We are unable to agree with that argument. No doubt the courts cannot substitute their discretion for that of the President in proclaiming trade agreements, but where, as here, the President bases his action on an incorrect interpretation of the effect of a law or proclamation, the courts

are not bound to accept that interpertation as correct. We are not barred from holding that Part IV is legally ineffective for the reason that it purports to do that which had already been done by the proclamation of November 16, 1939 which carried out the Venezuelan trade agreement and which was still in force.

We agree with the Government that while the wording of Proclamation No. 2901 leaves much to be desired, the intended purpose of the proclamation, so far as it relates to the import tax on the involved petroleum products, was within the scope of the President's authority, and the valid provisions of the proclamation are sufficient to give effect to that purpose. We are accordingly of the opinion, as we were in the *Metropolitan* case, that the collector's assessment of a tax or duty of ½ cent per gallon on the merchandise here involved was proper.

Before concluding this consideration we should like to revert to the fact that the Customs Court, though it acknowledged that this case is, "in all material respects, similar to that which was decided by a majority of our appellate court" in the *Metropolitan* case, permitted itself to be persuaded not to adhere to our decision therein that the proper rate of tax is ½ cent, and to go further and evolve an entirely new tax rate of ⅜ cent. So far as we can determine from the Customs Court's opinion, the reason for this was a mistake in concluding from certain passages in the *Metropolitan* opinion "that our appellate court was applying to the situation and enforcing the provisions of the Venezuelan Trade Agreement *as such* and not the Presidential proclamation, issued in relation thereto." This is closely parallel to the contention in the importers' brief before us that "this court departed from the statute when it held in the *Metropoli-*

tan Petroleum case * * * that the tax of ½ cent * * * became effective in 1951 by virtue of the provisions of the Venezuelan Trade Agreement * * *. The law did not give such force to a trade agreement alone." Both the lower court and the importers have favored us with several pages of instruction on the legal necessity of implementing trade agreements by means of proclamations. Perhaps the opinion in the *Metropolitan* case presumed too much on the reader's powers of observation, so we would like to point out that it refers three times directly, and several times more by inference, to the 1939 proclamation carrying out the Venezuelan trade agreement. On the whole we think it very plain that the opinion was based on the premise that the Venezuelan agreement was in effect, and remained in effect, by virtue of an unrescinded *proclamation*.

The decision of the United States Customs Court is *reversed*.

REVERSED

Jackson, J., Retired, recalled to participate herein in place of Cole, J., absent because of illness.

United States Court of Customs and Patent Appeals

* * *

THE UNITED STATES, *Appellant*, *v.* AMERICAN BITUMULS & ASPHALT Co., *et al.*, *Appellees.*	October Term 1956. Cutoms Appeal No. 4899. Customs Calendar No. 37.
AMERICAN BITUMULS & ASPHALT Co., *et al.*, *Appellants*, *v.* THE UNITED STATES, *Appellee.*	October Term 1956. Customs Appeal No. 4900. Customs Calendar No. 38.

WORLEY, Judge concurring.

My dissent in the *Metropolitan* case was based on the belief that the language in Section 350(a)(2) of the Tariff Act of 1930, as amended, that "No proclamation shall be made increasing or decreasing by more than 50 per centum any rate of duty, however established, existing on January 1, 1945, * * *" was applicable to *all* proclamations.

The *Metropolitan* case was decided in 1954. Even before then, however, the above section appears to have been interpreted by the executive branch as not applicable to "terminating" proclamations. Since Congress has ex-

tended the Reciprocal Trade Agreements Act without indicating dissatisfaction with that interpretation, or with this court's interpretation in the *Metropolitan* case, I must assume they are consistent with the congressional purposes and objectives, and, accordingly, concur with the majority herein.

United States Court of Customs and Patent Appeals

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 25th day of June, A. D. 1957.

* * *

THE UNITED STATES, *Appellant*, *v.* AMERICAN BITUMULS & ASPHALT Co., *et al.*, *Appellees.*	Customs Appeal No. 4899.
AMERICAN BITUMULS & ASPHALT Co., *et al.*, *Appellants*, *v.* THE UNITED STATES, *Appellee.*	Customs Appeal No. 4900.

Said appeals having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is:

ORDERED that the judgment of the United States Customs Court be, and the same is hereby, reversed, and said cause is remanded to said court for further proceedings consistent with the views expressed in the opinion of this court herein.

I, CABELL N. PRYOR, Clerk of the United States Court of Customs and Patent Appeals, do hereby certify that the above is a true and correct copy of the order made in the above-entitled case on the 25th day of June, A. D. 1957.

Witness my hand and seal of this court this 1st day of August, A. D. 1957.

CABELL N. PRYOR
Clerk.

(SEAL OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS)